In the Supreme Court
OF THE
United States

AUG 10
CHARLES ELMORE

OCTOBER TERM, 1951

No. 232

CITY AND COUNTY OF HONOLULU,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the
Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

THOMAS W. FLYNN,
Deputy Attorney General, Territory of Hawaii,
Attorney for Petitioner.

FRANK A. McKINLEY,
Acting City and County Attorney, City and County of Honolulu,
Of Counsel.

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to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your Petitioner, City and County of Honolulu respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on April 13,

1951. (R. 132.) A Petition for Rehearing was filed on May 11, 1951 and denied on May 17, 1951. (R. 133.)

OPINION.

The opinion of the Court of Appeals (R. 125-131) is reported in 188 F. (2d) 459-462.

JURISDICTION.

Judgment of the Court of Appeals was filed and entered April 13, 1951. (R. 132.) A Petition for Rehearing was filed on May 11, 1951 and denied on May 17, 1951. (R. 133.) The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 U.S. Code.

STATEMENT.

This is a proceeding in eminent domain instituted by the United States pursuant to the authority of several Acts of Congress to condemn, for the use of the Navy Department, the fee simple title in and to all the streets, roads and highways (except Lehua Avenue) lying within the Pearl City Peninsula for the purpose of effecting the Pearl Harbor Security Strip Perimeter Acquisition. (R. 2-4, 4 III.) The fee title to all but 1% or 2% of the 34.03 acres of streets condemned was in the Territory of Hawaii. (R. 97, 47-57, 112, 127.) A stipulation was entered into

and filed in these proceedings whereby it was agreed by and between the Territory of Hawaii and its political subdivision, the City and County of Honolulu, on the one hand and the United States on the other, that the City and County was deemed to be not only the owner of the beneficial interest of the streets, but also the owner of the fee; the Territory waived in favor of the City and County of Honolulu, any right it had to compensation. (R. 60-62.) The City and County of Honolulu claimed substantial compensation for the taking of the streets, roads and highways for the reason that the fee, encumbered as it was for road purposes, could be disencumbered by the Board of Supervisors of the City and County of Honolulu in adopting a resolution of abandonment and thereupon, the Commissioner of Public Lands, in the name of the Territory, could deliver merchantable title thereto for substantial consideration. (R. 78, 86-87, 96-97, 114, 128.) It was conceded by the City and County that such taking necessitated the construction of no substitute streets. (R. 114.) It is further conceded that up to the time of taking, the City and County evinced no intent to cause the abandonment of such roads, streets and highways.

The facts were undisputed in the District Court and the only question presented was one of law, to-wit: "Whether the City and County of Honolulu was entitled to nominal or substantial compensation for the taking of said streets". (R. 92-94.) The holding of the District Court of Hawaii was that the interest of the City and County of Honolulu was nominal only. (R. 112-114.)

In affirming the judgment of the District Court, the Opinion of the United States Court of Appeals (Ninth Circuit) reads in part as follows:

> "Being owned by the Territory in fee simple, they could have been sold by the Territory if they had been abandoned and had not been taken by appellee. However, they were not abandoned, and nothing in the record shows or tends to show that they would have been abandoned if they had not been taken. The probability of such abandonment, if any such probability existed, was too remote to be considered in determining the question of compensation". (R. 128.)

QUESTIONS PRESENTED.

(1) Need the owner of a fee encumbered for road purposes, disencumber such fee or have a proximate intent to so disencumber, prior to being entitled to more than nominal compensation for the taking thereof?

(2) Is the award of only nominal compensation for that land to which the municipality could have delivered merchantable title or could have appropriated to other public purposes, an abridgment of that protection afforded by the Fifth Amendment of the Constitution?

(3) Does the rule that "the true measure of compensation when a municipality streets are condemned is the cost of providing any necessary substitutes" govern to restrict the owner to only nominal compen-

sation when the fee taken could have been used for other public purposes?

(4) Does the rule that "the true measure of compensation when a municipality streets are condemned is the cost of providing any necessary substitutes" govern to restrict the owner to only nominal compensation when merchantable title to the fee could previously have been delivered for substantial consideration?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The exercise of the discretionary power of this Honorable Court is petitioned for the following reasons:

(1) The Appellate Court, in its Judgment and Opinion below, has committed the Judiciary to a position which in the belief of your Petitioner does violence to the Fifth Amendment of the Constitution, relating to the taking of property without just compensation. In the instant case, fee simple title was taken. Despite the fact that Petitioner offered to show that it had the power and capacity to deliver merchantable title for a substantial consideration, yet no more than nominal compensation was allowed. That Petitioner was deprived of an asset of substantial value was admitted in the Opinion below which reads in part as follows:

> "Being owned by the Territory in fee simple, they could have been sold by the Territory if they had been abandoned and had not been taken by appellee".

(2) The Appellate Court, in its Judgment and Opinion below, has committed the Judiciary to a position which in the belief of your Petitioner does violence to those basic principles heretofore enunciated by this Honorable Court relating to that protection afforded by the Fifth Amendment. The cases to which your Petitioner alludes are:

(a) *Olson v. U. S.,* 292 U.S. 246 at p. 255. Wherein it is set forth that

> "just compensation includes all elements of value that inhere in the property * * *"

(b) *U. S. v. Benedict,* 280 F. 76 at p. 82, affirmed on other grounds, 261 U.S. 294. Wherein it is stated that the holding in trust of land

> "* * * for a public purpose does not in any way change its market value".

(c) *Brown v. U. S.,* 263 U.S. 77 at p. 83. Wherein it is stated in part:

> "* * * It would be difficult to place a proper estimate of the value of the streets and alleys to be destroyed and not be restored in kind. A town is a business center. It is a unit. If three quarters of it is to be destroyed by appropriating it to an exclusive use like a reservoir, all property owners, both those ousted and those in the remaining quarter, as well as the state, whose subordinate agency of government is the municipality, are *injured.* A method of compensation by substitution would seem to be the best means of making the parties whole." (Italics ours.)

(3) The issue involved herein is of great moment to the public in that this Honorable Court is called

upon to adjudicate whether that protection afforded by the Fifth Amendment of the Constitution relating to just compensation, permits the fee to be taken but denies the owner its right to establish market value therein.

For the foregoing reasons it is respectfully submitted that this petition should be granted.

Dated, Honolulu, Hawaii,
July 27, 1951.

Respectfully submitted,
CITY AND COUNTY OF HONOLULU,
Petitioner.

By THOMAS W. FLYNN,
Deputy Attorney General, Territory of Hawaii,
Attorney for Petitioner.

FRANK A. McKINLEY,
Acting City and County Attorney, City and County of Honolulu,
Of Counsel.

Certificate of Counsel

I, the undersigned counsel for Petitioner herein, do hereby certify that the foregoing petition for a writ of certiorari in my opinion is well founded and meritorious and is not interposed or filed for the purpose of delay.

Dated, Honolulu, Hawaii,
July 27, 1951.

Thomas W. Flynn,
Deputy Attorney General, Territory of Hawaii,
Attorney for Petitioner.

Frank A. McKinley,
Acting City and County Attorney, City and County of Honolulu,
Of Counsel.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION.

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JURISDICTION.

Judgment of the Court of Appeals was filed and entered April 13, 1951. (R. 132.) A Petition for Rehearing was filed on May 11, 1951 and denied on May

17, 1951. (R. 133.) The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 U. S. Code.

STATEMENT.

This is a proceeding in eminent domain instituted by the United States pursuant to the authority of several Acts of Congress to condemn, for the use of the Navy Department, the fee simple title in and to all the streets, roads and highways (except Lehua Avenue) lying within the Pearl City Peninsula for the purpose of effecting the Pearl Harbor Security Strip Perimeter Acquisition. (R. 2-4, 4 III.) The fee title to all but 1% or 2% of the 34.03 acres of streets condemned was in the Territory of Hawaii. (R. 97, 47-57, 112, 127.) A stipulation was entered into and filed in these proceedings whereby it was agreed by and between the Territory of Hawaii and its political subdivision the City and County of Honolulu on the one hand and the United States on the other, that the City and County was deemed to be not only the owner of the beneficial interest of the streets, but also the owner of the fee; the Territory waived in favor of the City and County of Honolulu, any right it had to compensation. (R. 60-62.) The City and County of Honolulu claimed substantial compensation for the taking of the streets, roads and highways for the reason that the fee, encumbered as it was for road purposes, could be disencumbered by the Board of Supervisors of the City and County of Honolulu in adopting a resolution of abandonment and thereupon, the Commissioner of

Public Lands in the name of the Territory could deliver merchantable title thereto for substantial consideration. (R. 78, 86-87, 96-97, 114, 128.) It was conceded by the City and County that such taking necessitated the construction of no substitute streets. (R. 114.) It is further conceded that up to the time of taking, the City and County evinced no intent to cause the abandonment of such roads, streets and highways.

The facts were undisputed in the District Court and the only question presented was one of law, to-wit: "Whether the City and County of Honolulu was entitled to nominal or substantial compensation for the taking of said street." (R. 92-94.) The holding of the District Court of Hawaii was that the interest of the City and County of Honolulu was nominal only. (R. 112-114.)

In affirming the judgment of the District Court, the Opinion of the United States Court of Appeals (Ninth Circuit) reads in part as follows:

> "Being owned by the Territory in fee simple, they could have been sold by the Territory if they had been abandoned and had not been taken by appellee. However, they were not abandoned, and nothing in the record shows or tends to show that they would have been abandoned if they had not been taken. The probability of such abandonment, if any such probability existed, was too remote to be considered in determining the question of compensation."

STATUTE.

The Constitutional provision involved in this case and which is necessary to be considered is as follows:

Fifth Amendment, United States Constitution.

SPECIFICATION OF ERRORS.

The Court of Appeals erred:

(1) In affirming the Judgment of the District Court which awarded to the Territory of Hawaii and the City and County of Honolulu the sum of only $1.00 for the taking of the fee title to the land herein.

(2) In holding that the owner of a fee encumbered for road purposes, must disencumber such fee or have a proximate intent to so disencumber, prior to being entitled to more than nominal compensation for the taking thereof.

(3) In holding, in effect, that the awarding of only nominal compensation for that land to which the municipality could have delivered merchantable title or could have appropriated to other public purposes, is not an abridgment of that protection afforded by the Fifth Amendment of the Constitution.

(4) In holding that the rule that "the true measure of compensation when a municipality streets are condemned is the cost of providing any necessary substitute" governs when the fee is taken and that fee could have been used for other public purposes.

(5) In holding that the rule that "the true measure of compensation when a municipality streets are

condemned is the cost of providing any necessary substitute" governs when the fee is taken and merchantable title thereto could previously have been delivered for a substantial consideration.

ARGUMENT.

A. THE COURT OF APPEALS RECOGNIZED THAT THE STREETS CONSTITUTED AN ASSET OF SUBSTANTIAL VALUE WHICH COULD HAVE BEEN LIQUIDATED PRIOR TO THE TAKING.

The opinion, as we analyze it, recognizes the following stated propositions and concerning which the appellant is in thorough agreement:

1. The appellant, City and County of Honolulu, is entitled to the protection of the Fifth Amendment in the taking of its property by the United States Government.

2. Such property is considered to be "private property" for the purpose of being entitled to just compensation under the Fifth Amendment.

3. The stipulation by and between the Territory of Hawaii and the City and County of Honolulu on the one hand and the United States Government on the other, filed on March 24, 1948, merged, for the purpose of being entitled to compensation, the interest of the Territory of Hawaii and its political subdivision, the City and County of Honolulu.

4. The fee of the 34.03 acres of roads, streets, and highways, lying within the Pearl City Peninsula and taken by the Federal Government, was in the Territory of Hawaii.

5. Such fee was subject to an easement in the public for road purposes.

6. The Board of Supervisors of the City and County of Honolulu had the power to disencumber such fee by adopting a resolution of abandonment.

7. The Territory of Hawaii could thereupon deliver merchantable title to the fee so disencumbered.

The foregoing outline is summed up by the Court in that sentence of the opinion which reads:

> "Being owned by the territory in fee simple,[9] they could have been sold by the Territory if they had been abandoned and had not been taken by appellee.[10] (R. 128.)

B. DISTINGUISHING THE CHICAGO, BURLINGTON AND QUINCY CASE.

The Court of Appeals denied recovery of more than nominal compensation for the reason that there had been no abandonment or intent to abandon said streets. The Court, for its authority, cited the *Chicago, Burlington and Quincy* case. The pertinent portion of the opinion reads as follows:

> "However, they were not abandoned, and nothing in the record shows or tends to show that they would have been abandoned if they had not been taken.
>
> "The probability of such abandonment, if any such probability existed, was too remote to be considered in determining the question of compensation." Cf. *Chicago, Burlington & Quincy R.R. Co. v. Chicago,* 166 U.S. 226, 250-251. (R. 128.)

We respectfully submit that the principle of the *C. B. & Q.* case cited as authority for the last proposition is not applicable to the case at bar for the following stated reasons:

In the *C. B. & Q.* case, the City of Chicago proposed to extend Rockwell Street across the right-of-way of the C. B. & Q. Railroad. It was contemplated that the parcel of land identified as lying within the intersection of Rockwell Street extension and the railroad right-of-way was to be used jointly for railway and street purposes. Thus, the City of Chicago sought to impose an easement for street purposes upon that parcel forming the intersection, but without impairment of the ability of the railroad to continue to function. The Illinois Supreme Court denied more than nominal compensation. It is desired to point out that the economic utility of the fee of such intersection had been appropriated by the railroad in serving its other property forming a continuous and uninterrupted railway right-of-way. Had the railway conveyed out the fee without reserving a railway right-of-way easement, the value of the remaining right-of-way property as a railroad would be destroyed. On the other hand, the purchaser of such fee, if encumbered by a railway easement, coud never hope to obtain clear title without payment of an exorbitant sum to the railroad; a sum tremendously in excess of the market value of the parcel in question. Also, the imposition of the additional easement for street purposes onto the easement for railway purposes enabled the railroad to continue to function and diminished neither the value of its fee nor the value of its easement.

Let us take the principle of the *C. B. & Q.* case and apply it to one of the streets in the Pearl City Peninsula. Suppose the Navy Department acquired two parcels of land in the Pearl City Peninsula lying across the street from one another. Suppose also, that it was proposed that buildings be erected on each parcel and that the buildings were to be connected by basement, main floor and second floor runways; and further, that easements were sought to be acquired to carry out this plan and that such easements were to be superimposed on the easement for street purposes, so that that parcel identified as lying within the intersection of the street and the subterranean, surface and elevated runways, could function jointly as a street and a connecting way for the two buildings. Could it be expected that the Territory under such circumstances would be entitled to anything other than nominal compensation? Clear title to the intersection could not be delivered without destroying the function of the remainder of the street.

But now let us apply the principle of the streets in Pearl City Peninsula to the *C. B & Q.* case. The streets in Pearl City area form a cul-de-sac network; such network would function to a street system as a spur line, to a railway system. Suppose the City of Chicago proposed to extend Rockwell Street for a distance of 25,000 feet over and upon the entire spur line of the railroad? Also, that the proceedings in eminent domain call for the acquisition of the fee and the extinguishment of all encumbrances. Can there be any doubt but that the railroad in such circum-

stances would be entitled to substantial compensation for the taking of its spur line property and the extinguishment of its right to operate thereon? In the case at bar, the entire network of streets, excepting only Lehua Avenue, is acquired in fee, along with the total and complete extinguishment of eastment for road purposes, and to that end, the Territory of Hawaii and its political subdivision, the City and County of Honolulu, were made parties defendant as being the owner of the fee and the holders of the easement.

It is respectfully submitted that since the fee was held subject to being cleared by the single act of abandonment by the Board of Supervisors of the City and County of Honolulu, adopting a resolution thereof, the value was in the fee at the time of the taking, irrespective of the proximate or remote inclination of the Board of Supervisors to liquidate such value. Need a railroad have a proximate inclination to liquidate its spur line as a condition precedent to creating value therein? Is not the correct view that the capacity of the owner to terminate the license at will and convey out, free and clear, establishes the owner as being entitled to the full value of the fee at the time of the taking? And this is so, irrespective of whether the fee is being put to a use or purpose, which, until extinguishment, destroys the market value.

C. THAT THE COST-OF-SUBSTITUTION TEST IS THE EXCLUSIVE MEASURE OF DAMAGES, EVEN THOUGH THE FEE TAKEN COULD HAVE BEEN CONVEYED FOR A SUBSTANTIAL CONSIDERATION, CONFLICTS WITH BASIC PRINCIPLES ENUNCIATED BY THE SUPREME COURT OF THE UNITED STATES AND IN EFFECT NULLIFIES THAT PROTECTION GUARANTEED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The doctrine of the Court of Appeals in the instant case, that the cost-of-substitution test is the exclusive measure of damages and applies even though the Federal Government took the fee which the municipality could have caused to be conveyed for a substantial consideration, conflicts with the basic principles announced in *United States v. Benedict,* 280 F. 76, affirmed on other grounds, 261 U.S. 294; *Olson v. United States,* and 292 U.S. 246; *Brown v. United States,* 263 U.S. 77; and in effect nullifies the protection guaranteed by the Fifth Amendment of the United States Constitution.

It will be noted that the very purpose of the taking by the United States was to create a security perimeter hence excluding the public from the waters of Pearl Harbor. In the words of Mr. Chief Justice Taft, *United States v. Brown,* 253 U.S. 77, at page 83,

> "* * * It would be difficult to place a proper estimate of the value of the streets and alleys to be destroyed and not be restored in kind. A town is a business center. It is a unit. If three quarters of it is to be destroyed by appropriating it to an exclusive use like a reservoir, all property owners, both those ousted and those in the remaining quarter, as well as the state, whose

> subordinate agency of government is the municipality, are *injured*. A method of compensation by substitution would seem to be the best means of making the parties whole." (Italics ours.)

It would appear from the foregoing language that Mr. Chief Justice Taft geared his thinking to that basic principle of the law of Eminent Domain to the effect that where a portion of the whole is taken, the owner must be compensated for the part taken, together with severance damages to the remainder. A city's network of streets is a system; if a portion of that system is taken, the city is entitled to compensation for the value, if any, of the part taken, together with severance damages, if any, to the remainder.

There appears to have been no necessary relocation in the *Brown* case, in the sense that the phrase has been customarily interpreted by the Courts of Appeal to mean: relocation of the highway is necessary for the reason that persons outside the condemned area must be given access to the highway circuit. But just as the Supreme Court concluded, that the American Falls taxpayers were *injured* by the taking of three fourths of their streets, so it is reasonable to conclude that the taxpayers of the City and County of Honolulu are injured when 34.03 acres of their streets are taken. And over and above that consideration, the City and County owned (by stipulation) the fee title to all but one or two per cent of the land taken, and the record shows the city and county

could have delivered merchantable title to a substantial portion of that area or could have appropriated it to other public purposes. (R. 110-111.)

The City and County of Honolulu, owning the land within the roadbed and having, therefore, the highest and best of all titles, a fee simple, and by virtue thereof a right to its exclusive use, with the benefits and profits which attend thereon, is deprived of the right to use and occupy said roads or highways, and receives for this only $1.00 as compensation. That the City and County of Honolulu only used this property for highway purposes and may still use it in the same way is no answer. On this point this Court stated in *Olson v. United States,* 292 U.S. 246, at page 255:

> "Just compensation includes all elements of value that inhere in the property, but does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held."

Hence, to determine the value of the property, it is not the present use, but the possibilities of use.

The inquiry must be what is its worth from its availability for valuable uses? The value of this property does not depend alone on the uses to which it is now put, but also on the uses to which it may rightfully be put, and as shown by the testimony in the case, that portions of the land presently used as highways, are available and valuable for other public purposes or may be disposed of for substantial consideration, which possibility of use for such purposes is taken away when the land was appropriated by the United States.

In the case of *United States v. Benedict,* decided January 18, 1922, 2 Cir., 280 F. 76, affirmed on other grounds, 261 U.S. 294, the city, having obtained fee title to land for street purposes, was awarded the valuation of $2.00 per square foot for the taking of said property. The Circuit Court of Appeals in the *Benedict* case was of the view that the holding in trust of land "for a public purpose does not in any way change its market value."

We here contend that the rule of the Court of Appeals is in direct conflict with the principle enunciated in the *Benedict* case because in the instant case the Court of Appeals ruled that as a matter of law, the cost-of-substitute-roads is the exclusive measuse of damages irrespective of whether the taking includes a fee. The Court of Appeals ignored the fact that land appropriated for highway purposes or the easement thereon held in trust for the public does not destroy the full economic utility of the fee

especially where such appropriation or easement or a substantial portion thereof may be terminated at the will of the City and County of Honolulu—the holder of the fee—upon its Board of Supervisors adopting a resolution of abandonment, hence the Territory of Hawaii could deliver merchantable title to the land so abandoned. (R. 110-111.)

Since the fee was held subject to being cleared by the single act of abandonment by the Board of Supervisors, in adopting a resolution thereof, the value was in the fee at the time of the taking irrespective of the proximate or remote inclination of the Board of Supervisors to liquidate such value.

We, therefore, urge that the Court of Appeals committed error and ruled in conflict with the above authorities, and consequently the petition for writ of certiorari should be granted.

D. THE RULE THAT "THE TRUE MEASURE OF COMPENSATION WHEN A MUNICIPALITY STREETS ARE CONDEMNED IS THE COST OF PROVIDING ANY NECESSARY SUBSTITUTES" SHOULD NOT GOVERN TO RESTRICT THE MUNICIPALITY TO ONLY NOMINAL COMPENSATION WHEN THE FEE TAKEN CAN BE USED FOR OTHER THAN HIGHWAY PURPOSES.

In January 1944, there existed no firm expression from the United States Congress or judiciary as to the proper measure of value when the United States condemns a public highway. The rule that "the true measure of compensation when a municipality streets

are condemned is the cost of providing any necessary substitutes" was formulated in April 1945 and has since been recognized in the several circuits as the *exclusive* measure of compensation. We desire to point out that the measure of compensation as it applies to the taking of a highway owned or controlled by local government has shaped up in seven (7) different phases.

(a) "* * * It would be difficult to place a proper estimate of the value of the streets and alleys to be destroyed and not be restored in kind. A town is a business center. It is a unit. If three quarters of it is to be destroyed by appropriating it to an exclusive use like a reservoir, all property owners, both those ousted and those in the remaining quarter, as well as the state, whose subordinate agency of government is the municipality, are *injured.* A method of compensation by substitution would seem to be the best means of making the parties whole." *U. S. v. Brown,* 263 U.S. 77 at page 83; Appellant's Reply Brief, pages 2 and 3.

(b) In the event that substitute roads are required to be constructed by the taking, the Federal government discharged its constitutional liability in constructing such substitute roads. *U. S. v. Wheeler Township,* 66 F. (2d) 977; *Jefferson County v. Tennessee Valley Authority,* 146 F. (2d) 564.

(c) As between the construction cost of the road taken and the construction cost of the substitute, necessitated thereby, the construction cost of the substitute is the exclusive measure of

damages. *U. S. v. Los Angeles,* 163 F. (2d) 124; *U. S. v. Arkansas,* 164 F. (2d) 943.

(d) In the event no substitute roads are required, then the municipality is entitled to no more than nominal compensation. *U. S. v. Des Moines,* 148 F. (2d) 448; *U. S. v. Baltimore,* 147 F. (2d) 786; *U. S. v. Woodville, Oklahoma,* 152 F. (2d) 735.

(e) When no substitute roads are necessary, it follows that no compensation is allowed, but salvage value of a street facility will be allowed ($5,303.00 salvage value for bridges). *U. S. v. City of New York,* 168 F. (2d) 387 at 389-390.

(f) Such exclusive measure applies, even though the Federal government took the fee. *U. S. v. California,* 169 F. (2d) 914.

(g) This is true even though the municipality, prior to taking, could have abandoned said fee and caused it to be conveyed out for a substantial consideration. *City and County of Honolulu v. U. S.,* 188 F. (2d) 459.

The cost-of-substitution-rule evolved out of the condemnation of land in which the local government held only an easement thereon as trustee for the benefit of the public, as distinguished from owning the fee thereof subject to use for highway purposes. The basic consideration underlying the aforementioned rule was the fundamental fact that the easement had, and could have had no market value. Instead of attempting to award the market value to the holder of the easement, a method of compensation by substitution was deemed the best and most equitable

means, under the circumstances, of making the parties whole.

In the recent case of *State of California v. United States* (1949), 169 Fed. (2d) 194, the above mentioned rule was held by the Court of Appeals for the Ninth Circuit to apply with equal force to the situation where the State of California owned the fee in the roadbed. It must be noted, however, that such fee was submerged in twenty (20) feet of water and there appears to have been no attempt by the State of California to establish intrinsic value therein. Moreover, the State of California did not file a petition for writ of certiorari. This Court cannot then be deemed to have touched upon the application of the aforementioned rule in the taking of the fee. It is submitted by petitioner that because of the close correlation between the use and type of ownership, the several circuits of the United States Court of Appeals, in reaffirming the cost of substitution test, have shifted their attention away from the basic consideration: which measure of compensation, in the light of the estate taken, is most suitable for the specific property in question? Instead, the tendency has been to disregard the quality of the estate taken and concentrate solely upon the specific use to which the property was put at the time of taking and then mechanically, apply the cost of substitution rule. Thus, the cost of substitution has been the accepted test in the condemnation of roads, streets and highways, owned or controlled by local or state governments. In view of that protection afforded by

the Fifth Amendment of the Constitution, there is every reason to conclude that the market value test, when available, should be applied. Otherwise, what is it, that the Fifth Amendment protects, when we admit that

(a) Value has been taken (Arguments A, B, and C, supra),

(b) The owner is injured *(Brown v. U. S.)*, and still conclude that the owner is entitled to nominal compensation only?

CONCLUSION.

It is respectfully submitted that the petition for certiorari to review the decision of the Court of Appeals for the Ninth Circuit should be granted.

Dated, Honolulu, Hawaii,
July 27, 1951.

Respectfully submitted,
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